NO. [redacted] 200

IN THE

UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, Jr.,
Petitioner,

vs.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER and REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, Executors and Trustees under the Will of SAMUEL F. NIRDLINGER, Deceased,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

to Review Decree of the Circuit Court of Appeals Affirming Decree of the United States District Court for the District of New Jersey.

PETITIONER'S BRIEF

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SUPREME COURT OF THE UNITED STATES

HENRY E. STEVENS, JR.,
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Respondents.

On Petition for Writ of Certiorari to Review Decree of Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

This is a petition for a writ of certiorari to review a final decree of the Circuit Court of Appeals for the Third Circuit, affirming a decree of the United States District Court for the District of New Jersey overruling the defense of *res judicata* set up by Stevens, the appellant, and also adjudging the appellant to have no right, title or interest, etc., in and to certain lands and premises in dispute in this action. (For convenience, the desigination "Appellant" is used throughout this brief to designate the "Petitioner" in this court, and in order that the designation of the parties in the Circuit of Appeals

may be preserved without change.) The bill was filed by the respondent to quiet title to certain lands along the Atlantic Ocean at Atlantic City, and was based primarily on the New Jersey statute entitled, "An Act to compel the determination of claims to real estate in certain cases and to quiet title to the same" (4 N. J. C. S., 5399).

The *locus in quo* borders on the high water mark of the Atlantic Ocean and has been formed by accretions or alluvion.

A bill was filed in the New Jersey Court of Chancery on October 2, 1909, against the same defendant and praying for the same relief in respect to the same property. The original bill claimed the *locus in quo* by reason of accretions "in front of said tract of land by alluvial deposits." An amended bill was filed in which the claim based upon accretions was abandoned and a claim based upon deeds executed by Jno. McClees and the heirs of Robert B. Leeds (a former owner) was substituted. At the final hearing in the Court of Chancery this amendment was made, and the defendant in that suit (Stevens) applied for, and was granted, permission to answer the amended bill, and also to include in the defendant's claim of title based upon a riparian grant, a claim by accretions. (See State of the Case, *Dewey Land Co. vs. Stevens*, p. 24.) In the Chancery suit the defendant there (Stevens) claimed under a riparian grant from the State of New Jersey as well as by accretions. After a hearing on the merits in the Court of Chancery an order was entered dismissing the bill of complaint, which order in part reads as follows:

> "And it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters

and things in their bill of complaint contained and set forth, and that the said bill ought to be dismissed with costs:

"It is, thereupon, etc., ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs."

From this final order or decree an appeal was taken to the New Jersey Court of Errors and Appeals, which latter court after a hearing on the merits entered a decree of affirmance, and remitted the record to the Court of Chancery.

Subsequently the bill in the case *sub judice* was filed, and in the answer the defense of *res judicata* was set up in bar of the action as well as a defense on the merits based upon the riparian grant from the State of New Jersey and the claim by accretions.

The appellant and respondent are co-terminus owners of lands bordering on the Atlantic Ocean, their lots being located on opposite sides of New Hampshire Avenue, which runs in a generally southerly direction.

The facts with relation to the claim on the merits will be discussed in a subsequent portion of this brief.

RES JUDICATA.

Before discussing the opinion of Judge Haight it will be well to consider the nature of a suit to quiet title under the New Jersey statute. Under the statute it is only incumbent upon the complainant in such a suit to set up the jurisdictional facts of peaceable possession, a hostile claim, and the

fact that no suit is pending to enforce such claim. These facts being established the court has jurisdiction to determine the controversy and the defendant is required to assert, set forth, and establish his title or claim. Failing to do all of these things it is adjudged that he has no title or claim. Upon the establishment of the jurisdictional grounds the position of the defendant in the suit is shifted so that he becomes in effect a plaintiff in an ejectment suit. *Fittichauer vs. Metropolitan Fireproofing Co.*, 70 N. J. Eq. 429, 431. In other words, if the defendant makes no proofs the complainant succeeds by virtue of his possessory title.

Obviously a title by possession is better than no title, so that in order for a defendant to defeat the complainant in such a suit he must show and prove a title superior to the complainant's title by possession. Hence any adjudication or determination of the Court that the complainant is not entitled to relief carries with it as a necessary corollary the fact that the defendant has asserted and proved a title superior to that exhibited and proved by the complainant in such a suit. Of course, the doctrine of *res judicata* applies not only to the claim or demand in controversy concluding the parties and those in privity with them, not only as to any matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. See *Cromwell vs. County of Sac.*, 94 U. S. 351.

It is perfectly obvious that in the Chancery suit not only was opportunity afforded to the complainant to base his claim upon accretions, but such claim was actually made by him and abandoned. He is, therefore, concluded in that suit, as well as in this, as to such claim.

The opinion of Judge Haight waives this aside simply by the single sentence: "But this is a *non sequitur.*" But is it? Bearing in mind that if the defendant establishes no claim superior to that of the complainant's title by possession the defendant is defeated in the action, is it not inevitable that the Court of Errors and Appeals was compelled to balance the defendant's title as against the complainant's? And did this not necessarily involve a determination that the title asserted by the defendant under its riparian deed was superior to the complainant's title by possession? Did it not, so far as the law of the case is concerned, necessarily involve a determination as to the validity of the defendant's title under the riparian grant? If the riparian grant conferred no title upon the defendant, then the complainant was entitled to a decree of reversal adjudging that the defendant was entitled to no interest in the land.

The learned trial Judge then indulges in the following conjectures:

> "It may be that the decision has established a new jurisdictional requirement, viz: That the plaintiff must establish some kind of title to the land in controversy before the defendant is required to set forth and establish his claim, and in the event of his failure so to do the Court is not at liberty to entertain a bill filed under the statute in question."

The nature of the statutory action is discussed with great clearness by Vice-Chancellor Stevenson in *Fittichauer vs. Metropolitan Fireproofing Co., supra.* In that case the Court said:

> "Complainant is under no obligation even to exhibit his own title until after the defendant has shown title."

This must be so, because until the defendant avers and proves a superior title the complainant would recover under his title by possession.

In view of the somewhat elaborate discussion of the rights of the defendant under his riparian grants from the state, two opinions having been filed in the cause, it is difficult to perceive why, if the Court desired to establish a new jurisdictional requirement in conflict with the statute and the adjudicated cases it would not have said so in plain and unmistakable language, and if this was its purpose the discussion of the rights of the defendant under the riparian grant appears to have been an idle waste of time on the part of an otherwise busy and industrious Court.

The second conjecture of the learned trial Judge is as follows:

> "On the other hand its action in merely affirming the dismissal of the bill may have been due to the fact that upon examining the record it found that the deeds relied upon by the complainants conferred no title upon them, and consequently it adopted *a practical and convenient* way of disposing of the case, and thus rendering it unnecessary for it to determine whether or not the defendant had any interest in the land, and hence it advisedly merely dismissed the bill; the complainants being treated rather as interlopers without a shadow of title."

It is difficult to understand why the second conjecture should be prefaced by "on the other hand." The conjecture in its nature is practically the same as the first conjecture, and entirely ignores the fact that no complainant who establishes possession, and against whom a higher title is not asserted and

proved, is an "interloper," but on the contrary is entitled to a decree adjudging that his adversary has no right, claim or demand upon the *locus in quo.*

The cases cited in the opinion, and also previously cited by counsel for the respondents, all deal with questions where the appeal was dismissed for want of jurisdiction. The Court of Chancery, in its opinion, found as a fact that "the jurisdictional facts of peaceable possession in the complainant and no suit pending, are present."

A "practical and convenient way of disposing of the case" would have been for the Court to have said: "The court below was without jurisdiction to entertain this bill because certain jurisdictional facts (specifying them) are not established in this case." This course would have saved the Court much labor and research on the riparian grants involved. It could not have said this, however, because all of the jurisdictional facts prescribed by the statute were established.

It seems to us impossible to read the opinion of Justice Swayze and of Judge White in the New Jersey Court of Errors and Appeals and reach the conclusion that this case was not decided in that court on the ground that the defendant's riparian claim was superior to the complainant's claim. Indeed, the third syllabus in that case says:

> "HELD: That plaintiffs could not sustain their claim to the land under the grants to the former owners as *against the state's riparian grant.*"

It appears in the opinion of Mr. Justice Swayze that the bill originally filed claimed title by accretion, and that this claim was abandoned, and by an amended bill the complainant set up title by deed from former owners.

The reason why the claim for accretion was not tried in the Chancery suit was because of its voluntary abandonment by the complainant therein. He had full and fair opportunity to litigate that question in the Chancery suit. He chose, however, to abandon it, but he is bound to the same extent as though he had actually litigated the case on the theory of accretions. He has no right to reopen litigation which is closed by the final decree of a Court of Last Resort. He has no right to relitigate a controversy settled by the decree of the Court of Last Resort in order to try the case upon a ground voluntarily abandoned by him in the first suit. Litigation would be unending if litigants are to be accorded a right to try the case repeatedly upon grounds that were available in the first suit.

In the opinion below the learned trial Judge said:

> "I accordingly conclude that the New Jersey decree is not *res adjudicata* of the questions in this case. If a contrary conclusion was reached there would be presented a situation where, although the title or interest of the defendant had never been settled, neither party would ever be able to procure a decree under the statute setting at rest the title to the land. Indeed the practical effect would be to confirm the defendant's claim of title to land of which the complainant was and is in peaceable possession, not because it had ever been so decreed by any court, but because in a previous suit the complainant had failed to established his title."

This seems to beg the question. If this Court is of the opinion that this case was tried on its merits in the Court of Chancery and the Court of Errors and Appeals of New Jersey, and that the determin-

ation of such case necessarily adjudged that the defendant's claim was superior to that of the complainant, then the matter is *res judicata*, be the inconvenience what it may. If the doctrine of *res judicata* is established it would not be a difficult matter for the appellant out of possession, whose rights had been adjudged to be superior to those of the person in possession, to obtain judicial relief in the proper forum and by the proper proceedings. It might be suggested that a suit in ejectment would be available as an effective means to accomplish the desired result.

In disposing of the defense of *res judicata* the sole question is: Did the New Jersey Court of Chancery and the Court of Errors and Appeals determine the case on the merits, and did it find that the defendant's title was superior?

The plaintiff says the matter is not *res judicata* because—(a) The plaintiff's claim by accretions was not passed upon in the New Jersey suit. (b) Because the present suit is a *quia timet* suit for the purpose of removing a cloud upon the title, and under the general equity power of the Court as distinguished from a suit under the New Jersey statute.

Are these reasons sound? and do they differentiate this suit from the New Jersey suit? Is there anything in this suit that could not and should not have been tried in the New Jersey suit?

The purpose of an equity suit is best determined by an examination of the prayer for relief. The prayer in the original bill filed in the New Jersey

Court of Chancery, so far as it is here relevant, reads as follows:

> "To the end, therefore, that the defendants may, in manner aforesaid, answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them make or claim, and to what part or what interest; and further how, and by what instrument such title is claimed or derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orators may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."
>
> *Appeal Record*, pages 31 and 32.

The prayer in the amended bill is identical with that of the original bill. (*Appeal Record*, p. 38.)

The prayer in the bill *sub judice* is identical in substance with the prayer of the other two bills, except that there is added thereto the following:

> "And that the cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to may be, so far as said lands and premises are concerned, declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and

> title to said lands and premises may be decreed to be relieved from the lien or cloud occasioned by the said alleged riparian grant and deed of conveyance, and that the said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed."

The additional matter at best is but surplus verbiage. Without the added matter the plaintiff prayed that he might be decreed to have a perfect title and the defendant to have no estate, interest in, or encumbrance upon the said lands, etc. No additional force is given to the prayer which asks that the defendant be decreed "to have no estate, interest in, or encumbrance upon the said lands and premises by reason of said alleged riparian grant and deed." It is axiomatic that the greater includes the less. Indeed, Judge Haight, in his opinion, says:

> "Sometime prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the same statute against the *same* defendant and therein sought the *same* relief in respect to substantially the *same* property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit, specifically pray for the removal of the before mentioned alleged cloud upon the title" ——

the "alleged cloud" being the claim under the riparian deeds set up by the defendant in the New Jersey suit.

The principal ground advanced by the plaintiff why the New Jersey decree was not *res judicata* is the following appearing upon the complainant's brief in the court below:

> "The issues in a bill to quiet title under the statute are determined by the defendant. The title that he asserts, whether one or more, constitutes the issue or issues in the cause. Under the statute *there is no opportunity for the complainant to alter or vary the issue,* to wit, the title claimed by the defendant, hence it is beside the question for defendant now to assert that complainant should have litigated some claim not litigated in that suit."

Is this assumption well founded? Bearing in mind that the statutory suit to quiet title is in effect a suit in ejectment, with the parties standing in the reverse order, and that the defendant is, therefore, the plaintiff in ejectment, can it seriously be contended that the issue is limited solely to the examination of the title presented by the defendant (plaintiff in ejectment), and that no opportunity is given to the opposite party to show a superior title? If the issue to be tried is: "Is the title or right of the defendant superior to that of the complainant?" then manifestly the Court must examine all of the claims of both of the parties to the suit. It is only upon the theory that the Court in a suit to quiet title does *not* try all of the claims between the parties, and does *not* permit the complainant to assert all of his claims that the complainant's contention would be entitled to any weight. That the complainant is not so restricted is self-evident.

The plaintiff is trying in this very cause, in the same form of action, and based upon the same stat-

ute, the identical issues which ha tried in the New Jersey Court. If the claim by accretions is available here why was it not available in the New Jersey suit? And if it is not available under the New Jersey statute how does it become available here?

In the trial Court the plaintiff in his brief advanced the following argument:

> "As we have already seen the complainant, in a bill under the statute to quiet titles, whose possession of the *locus in quo* is not questioned, is not compelled either to allege or prove the source of his title, or, indeed, that he has any title until and unless the defendant shows some interest or title in the lands. *Thereupon complainant is required to show that the said interest or title is not a valid interest or title to the lands. This he may do by showing an inherent defect in the claim or title asserted, or by showing that he has a superior title thereto.* Hence if, as in the New Jersey case and here, that possession is undisputed, the burden is at once cast upon the defendant to open and maintain his case affirmatively, and to establish the validity of his claim or title to the property in the complainant's possession."

This is a correct statement of the law, but is absolutely in conflict with the position taken by the plaintiff, both in the oral argument in this court and in the brief submitted in the court below, to wit, that "under the statute there is no opportunity for complainant to alter or vary the issue, to wit, the title claimed by the defendant."

An attempt is made to give this case a different aspect by asserting "an independent claim under the general jurisdiction of the Court to have the

cloud arising from the riparian grant removed," based upon general equitable principles of *quia timet.*" This is equally untenable.

The only difference between the bill to quiet title under the statute and that under the general equity powers of the Court, is that in the former a jurisdictional element required to be proved by the complainant is that of peaceable possession. If this is not proved the complainant fails. In the cases under the general equity powers it is not necessary for the complainant to prove possession, but since possession in the case *sub judice* was admitted the two classes of action become identical. The fact of possession under the statutory procedure merely enables the complainant to maintain his action. In other words, the complainant under the general equity powers may say, "Even though I do not prove possession I may maintain my action." But as there was no question of possession in this case the action is maintainable, and being maintainable no greater relief could be had under the general equity powers than under the statutory proceedings.

The alleged "cloud upon the title" was the State's riparian grant, which was directly in issue in the New Jersey suit as well as in this suit. The plaintiff gains no additional rights by merely designating the adverse claim as a "cloud upon the title," for the reason that under the statutory action the defendant is required to set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, the defendant makes or claims, and to what part or what interest; and further how and by what instrument such title is claimed or derived or was created; and the prayer is "that by the determination and final decree of this Court the rights of all the parties to this suit in and to the lands

hereinbefore set forth, and every part thereof, may be fixed and settled, and that your orators may be decreed to have a perfect title thereto, and the defendants to have no interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."

Certainly the "cloud on the title" is embraced within the intendment of the statute and the broad prayer for relief in the bill of complaint.

Vice-Chancellor Walker in his opinion in *Dewey Land Co. vs. Stevens*, Exhibit D1, page 110, lines 19 and 20, find that "The jurisdictional facts of peaceable possession in the complainant and no suit pending, are present." These were precisely the same jurisdictional facts that are found by Judge Haight in his opinion, at page 330, lines 32 and 33.

Judge Haight in his opinion, in order to sustain the theory that the dismissal of the bill of complaint in the New Jersey Court was equivalent only to a non-suit, cites the cases of *Steelman vs. Blackman*, 72 N. J. Eq. 330, and *Oberon Land Co. vs. Dunn*, 60 N. J. Eq. 280, where the complainant's bill in each case was dismissed for failure to establish the jurisditional facts.

In *Steelman vs. Blackman*, the jurisdictional facts were lacking, and in *Oberon Land Co. vs. Dunn*, the Court lost jurisdiction by the act of the parties themselves, the parties having parted with all interest pending the litigation. These cases have no applicability to a case where the jurisdictional facts were established. Neither of the cases cited in Judge Haight's opinion attempted to deal with the merits of the respective title or claims of the complainant and defendant as was done in the case of *Dewey Land Co. vs. Stevens*.

Some capital is attempted to be made out of the refusal of Vice-Chancellor Backes in an opinion re-

ported in 85 N. J. Eq. 374, 96 Atl. Rep. 362, to amend the decree of the Court of Chancery by making the same more specific. This motion was denied, not on the merits of the application, but because the Vice-Chancellor conceived that the Court of Chancery was without power to amend a decree after the same had been affirmed by the Court of Errors and Appeals. He says in his opinion:

> "The motion, in effect, is to amend the decree of the Court of Appeals. Upon a simple affirmance on the merits, there is nothing further for the lower court to do in the case but to enter the mandate and enforce the judgment."

A judgment if rendered upon the merits constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy concluding the parties and those in privity with them, *not only as to every matter that was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.*

The above doctrine is supported by *Cromwell vs. The County of Sac*, 94 U. S. 351; *Paterson vs. Baker*, 51 N. J. Eq. 49; *Clark Thread Co. vs. Wm. Clark Co.*, 55 N. J. Eq. 658.

The plaintiff attempts to show from the cases above cited that this rule applies only in situations where the cause of action is the same, and that the cause of action in the case *sub judice* differs from the cause of action in the New Jersey suit, hence that the rule is not applicable. It is elementary that if in the first suit no opportunity was available to present under the form of action a cause of action or defense, that the parties cannot be concluded by the earlier adjudication, because the effect of such

a holding would be to deny such party any opportunity to be heard. If no opportunity existed in the first suit, and a defense was not available in the second, it is evident that the party never could be heard upon the merits. The answer is that the matter was not previously adjudicated; that there was no opportunity to adjudicate it, and that hence the matter could not be *res judicata*.

In *Cromwell vs. The County of Sac*, it was held that there had been no previous opportunity to raise the question mooted in the second action, to wit, that the plaintiff therein was a *bona fide* holder for value of certain municipal bonds. In the case *sub judice* the plaintiff not only had the opportunity to base his claim upon accretions, but actually did so, and voluntarily abandoned such claim.

The case of *Paterson vs. Baker*, 51 N. J. Eq. 49, supports the appellant Stevens' contention. In that case the plaintiff had issued 200 coupon bonds, certain of which had gone into the possession of John Petrie. Two of these were stolen from Petrie, and subsequently after public notice of the theft had been given, the complainant, after receiving a bond of indemnity paid Petrie the full value of the bonds. The stolen bonds came later into the possession of Baker, the defendant, who presented them for payment, and upon payment being refused brought suit against the complainant to recover the amount due on the coupons attached to the bonds. The defense that Baker was not the *bona fide* holder was upheld. Baker died leaving a will which made his wife executrix. The city then brought suit in Chancery against the widow to have the bonds surrendered for cancellation, and it was held, upon the latter's attempt to show that she was a *bona fide* holder of the same; that this question had been finally determined and was *res judicata*.

Clark Thread Co. vs. Wm. Clark Co., 55 N. J. Eq. 658. The opinion in that case reveals the fact that the complainant had previously brought suit in the United States District Court for an injunction against the use of a trade-mark and for accounting for profits realized by its use. The suit instead of being directed against the company using the trade-mark had been brought against the latter's manager who served the company on a salary. The Federal Court allowed an injunction but refused to consider the prayer for an accounting because no profits could be shown against the defendant. The second suit reported under the above title was against the company itself and prayed for an accounting. The Court held that though there was an identity of parties in the two suits (treating the principal and agent as one), the rule of *res judicata* would not apply in view of the fact that under the first suit it had been impossible to show profits.

> "It is entirely clear from the record in the preceding case and the testimony in this, that this was the reason why the decree in the former case was silent upon the question of accounting. It appeared in the evidence of the preceding case, without contradiction, and was stated in the brief of counsel for the defendant in that case, that Armitage was an employe of the William Clark Company upon a stated salary, beyond which he received nothing. All the profits received from sales made through his agency went to the present defendant. If the agent received no profits, it did not follow that the principal received none. Therefore, the decree in the first case, based upon the fact that the agent had received no profits, could not conclude the complainant from an accounting

against the principal for profits which it had received. The two decrees can stand together."
55 *N. J. Eq.* 667.

To summarize the reasons why the New Jersey suit was *res judicata* and the decree therein a bar to this action, we submit the following:

1. That the suits are identical in character, parties and privies, and in the prayers for relief.

2. That every title, right or claim asserted by the plaintiff in this suit were equally available to him in the New Jersey suit.

3. That the New Jersey suit was determined upon the merits and the opposing claims of the plaintiff and defendant were considered and there adjudicated, and the defendant Stevens' title was adjudged to be superior to that of the plaintiff Nirdlinger.

4. That the plaintiff Nirdlinger was bound in the New Jersey suit, not only as to any matter which was offered and received to sustain his claim or to defeat the claim or demand of Stevens, but as to any other admissible matter which might have been offered for that purpose. That among such admissible matters was the claim for accretions which was actually advanced in the original bill of complaint and later voluntarily abandoned by the complainant therein.

5. That the dismissal of the plaintiffs' bill in the New Jersey suit was not the equivalent of a non-suit, but was a dismissal after a hearing upon the merits, and that such dismissal constituted an adjudica-

plained of the loss of his vested right of adjacency. The Court of Errors, after full consideration, deliberately overruled the effect of the earlier decisions, and held that there was no right of adjacency in this state, and that the title of the state to its subaqueous lands was absolute and proprietary in character.

Since then *Stevens vs. The Railroad* has been continually cited as upholding the absolute character of the state's title. Among many cases we may cite the following:

Hoboken vs. Penn. Railroad, 124 U. S. 656;
Hoboken vs. Hoboken Land & Imp. Co., 36 N. J. L. 540;
American Dock & Imp. Co. vs. Trustees of Public Schools, 39 N. J. Eq. 409;
Marcus Sayre vs. Newark, 60 N. J. Eq. 368;
Simpson vs. Morehead, 65 N. J. Eq. 629;
Phil. Brewing Co. vs. McOwen, 76 N. J. L. 636;
Sooy Oyster Co. vs. Gaskill, 71 N. J. Eq. 308;
Attorney-General vs. Lehigh Valley R. R. Co., 78 N. J. Eq. 349.

The doctrine of *Stevens vs. The Railroad* has never been limited or modified unless it is considered that the existence of the *jus publicum* is a limitation. While navigable lands remain under water they are subject, whoever the owner may be, to such public uses as navigation, fishing, bathing, etc.

The *Stevens* case was cited in both the majority and concurring opinions filed in *Dewey Land Co. vs. Stevens*. In the majority opinion it was referred to as establishing the defendant's *prima facie* case (despite the fact that the accretions had filled in

nearly all the space included within the State's grant). The fact that it is also cited by Judge White shows that it was before the Court in conference and its authority there understood and appreciated.

TITLE BY ACCRETIONS.

It must be borne in mind that both the original line of high water and the present high water line are convex in contour, and that the new high water line is more than double the length of the original line.

How shall this longer line be equitably divided between coterminus owners claiming under a common grantor?

The first question to be settled is the time when the rights of the respective parties accrue. This has been settled in New Jersey as follows:

> "As between vendor and vendee the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title."
>
> *Ocean City Assn. vs. Shriver,* 64 N. J. L. 550, 551.

The title was in the common grantor, to wit, the Atlantic Beach Front Improvement Company, until November 9, 1899, when it was granted to Burkhard, Stevens' predecessor in title. (Exhibit D1, Appeal Record, N. J. Ct. of E. & A., p. 92.)

The easterly ninety feet of plaintiff's lands were conveyed by the common grantor, the Atlantic Beach Front Improvement Company, to the States Avenue Land Company, by deed dated May 24, 1900.

The question, therefore, presented is: What would have been an equitable method of division between Burkhard and the Atlantic Beach Front Improvement Company of lands formed by accretions since November 9, 1899? Would the Atlantic Beach Front Improvement Company have been entitled to all of the gains, while Burkhard would be restricted not only to his original ocean frontage, but to a shorter line? Because obviously the effect of protracting Burkhard's side lines would be to effect such a reduction, since his original shore line ran at an oblique angle.

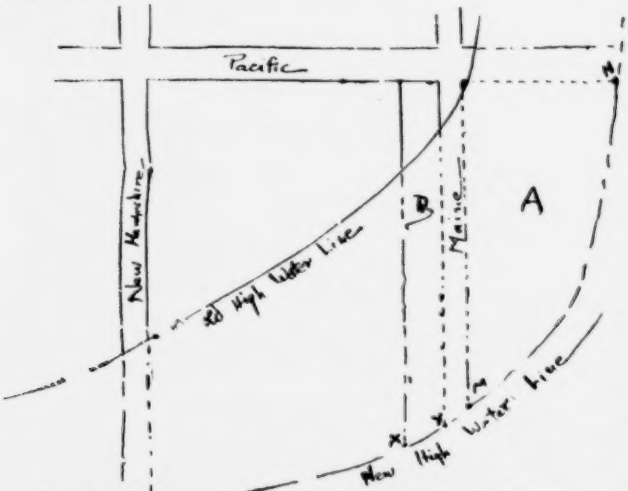
In order to sustain the decree in this case it must be held against all authority that under such circumstance one co-terminus owner is entitled to all of the gain caused by the longer shore line, and the other to no part of such gain. Is there any way of equitably dividing a segment except by radial lines? The attempt to do otherwise, it seems to us, is equivalent to an attempt to square a circle.

The difficulty with the opinion of Judge Haight is that he does not apply his method to the whole area of accretions, nor does he apply it to the rights of the parties as they accrued at the time of the conveyance from the common grantor, to wit, November 9, 1899. He conveniently moves his trouble further up the beach and leaves it there. He says:

> "Whether the riparian proprietors who owned lands east of the plaintiff's lands should have the accretions divided among them on lines parallel with New Hampshire Avenue, or on lines parallel with Pacific and Oriental Avenues, it is not necessary to decide."

But there is a necessity for such a decision if we are correct in our major premise that the real ques-

tion in controversy is: How should the longer high water mark be divided between Burkhard and the Atlantic Beach Front Improvement Company? The method suggested by Judge Haight ignores this factor and ignores a large part of the accreted territory lying to the east, and his method, if carried to its ultimate conclusion, would result in the owner holding the extreme easterly portion of the shore taking all of the gain by accretion within the boundaries of Pacific Avenue and Maine Avenue extended. Even though he owned but a foot of ground he would become the owner between lines diverging at an angle of ninety degrees of a great tract of accreted land. This point may be illustrated by the following rough sketch:



The tract marked A is the result obtained by adopting the side line extension scheme. B, the adjoining lot owner, acquires a smaller water frontage on the new high water line (X-Y) than he had on the

old; while A, owning only a foot of land, acquires the extensive frontage indicated (M-N). This is the result of side line extension—a mere legal lottery.

General Principles of Accretions.

Concerning the general principles of division Professor Farnham has the following to say:

> "In *Deerfield vs. Arms*, 17 Pick. 41, the Court says two objects are to be kept in view in the division of a water front; one is that the parties shall have an equal share in proportion to their lands of the area of newly formed land, regarding it as land useful to the purpose of cultivation or otherwise in which the value will be in proportion to the quantity; the other is to secure to each an access to the water and an equal share of the river line in proportion to his share on the original line of water, regarding such water line in many situations as principally useful for forming landing places, docks, etc., with a view to benefits of navigation. *The main object to be kept in view in any division of accretions or the bed of water is that the division shall be equitable, and that it shall be proportionable so far as to give each shore owner a share of the land to be divided and his due portion of the exterior water line.*"
>
> 3 *Farnham on Waters*, p. 2474.

> "The title by accretions or right of accession in relation to land is a sort of legislative donation of what would without such donation be public property * * * . This legal title refers, it is true, to one of the lines of the riparian pro-

prietor's original title as a measure of his right of accession in the alluvial accretions of soil. But the line so referred to is not the side lines of the original conveyance or grant. It is its front line, and the front line alone. The course of side lines is of no consequence in the division of alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such a manner as that each of the contiguous riparian proprietors *shall have such a proportion of alluvial soil as the total extent of his front line bears to the total quantity of the alluvial soil to be divided.*"

Delord vs. New Orleans, 11 La. Ann. 699. (The italics are our own.)

The principle universally recognized by Courts that are called upon to establish rules for division of riparian lands, is that the upland owners are entitled to take new front in proportion to their ownership of the old frontage. In those cases where right angles were drawn to determine a division it will be found that the shore was straight, and that a proportionate division of the new shore line was thereby effected. Where the shore does not form a straight line, but is convex or concave, and the protraction of the side lines being impracticable, the new water front is divided proportionately.

Wonson vs. Wonson, 14 Allen, 71;
Batchelder vs. Keniston, 51 N. H. 496;
Kehr vs. Snyder, 114 Ill. 313;
Deerfield vs. Arms, 17 Pick. 45;
Johnston vs. Jones, 66 U. S. 1;
O'Donnell vs. Kelsey, 10 N. Y. 412;
Nauman vs. Burch, 91 Ill. App. 48;
Berry vs. Hoogendoorn, 133 Iowa, 437, 108 N. W. 923;

Newell vs. Leathers, 50 La. Ann. 162, 23 So. 243;
Hathaway vs. Milwaukee, 132 Wis. 249, 9 L. R. A. (N. S.) 778; 111 N. W. 570, 112 N. W. 455;
Groner vs. Foster, 94 Va. 650, 27 S. E. 493;
Stock vs. Neriwhether, 57 Pac. 438 (Kan. S. C. 1916);
Reed vs. Moore, 151 S. W. 1005 (S. C. Ark. 1912);
Malone vs. Moves, 145 S. W. 193 (S. C. Ark. 1912).

With regard to lakes, the same principle controls. *Calkines vs. Hart* (N. Y. Ct. of App. 1916), 113 N. E. 785; *L. R. A.* 1917 B. 783, and the cases set forth in the foot note to the L. R. A. reference noted above.

The cases on the subject have been collected and are set forth in two comprehensive editorial notes found in 21 *L. R. A.* 776, and 25 *L. R. A.* (N. S.) 257.

Judge White, in his opinion in *Dewey Land Co. vs. Stevens*, adopts the apportionment made by the riparian commission, which covers the entire frontage of lands formerly owned by the common grantor, as equitable. Indeed, it requires but a single glance at the map (Exhibit D8) to satisfy one of the correctness of this view. It is inevitable from the contour of the shore line that the line of the riparian grants and the lines of accretions should be coincident. Judge White says in his opinion:

> "Of course, changes are constantly taking place in the high water lines and in the direction thereof. A shore which one year was concave in its contour may a year later have become convex. The resultant effect upon lines projected at right angles to it at various points during the

process of transition to determine boundaries between neighboring accretion gains, is hopelessly confusing and the consequent state of uncertainty in titles most injurious. A practical working system is necessary for the good of all, *and where such a system has been established its fairness must be more than questioned, in fact, must be clearly overthrown, before the courts will feel justified in intervening. Such a working system seems to have been adopted by the riparian commission under its appointment by, and within the discretion vested in it by the sovereign power of the state.* Under this working system it takes the line of general contour of the shore in the vicinity, and, disregarding local or trivial or temporary indentations or excrescences, runs its division lines at right angles, or as nearly at right angles as is equitable under the circumstances, to such general line of contour at the time it takes up the subject of making riparian grants in such vicinity, and then, subsequently adheres as nearly as possible, or as is equitable, to the general division lines thus established, without regard to the fact that subsequent shifting of angles and locations of the high water line may have brought about a condition which, if it had existed originally, would have produced different results in the directions of such division lines. *Not only do I fail to see any unfairness in this working system, but, on the contrary, I cannot see how any other could be practical.* Where, therefore, as here, the riparian commission has made a grant, the bounding division or side lines of which run at right angles, if that is equitable, or if not, at such angle as,

under the circumstances, is equitable, to the general contour of the shore at the time of the plotting or surveying of the vicinity for riparian granting, such lines will, I think, be upheld by the courts as a *practical and legal ascertainment* of the boundary lines of subsequent accretion gains to the adjacent high land should such gains occur. *Gould Wat. Secs.* 162, 163. This is so, I take it, not because the state, through the riparian grant, has vested in its grantee a title to land under water which survives when the land by accretions to the adjacent high land has ceased to be under water, but because the riparian grant, as here made, is by its very authority confined to the land under water in front of the grantees adjacent high land, viz., to the land which would become his by accretion to such high land should natural accretions occur, and, consequently, the division boundary lines defined in the grant are an authoritative ascertainment by the granting tribunal of the boundary lines of these accretion gains should they occur. Gould Wat. Sec. 162."

Dewey Land Co. vs. Stevens, 83 N. J. Eq. 656.

Plaintiff in the argument below cited a number of Massachusetts cases in support of his contention that where the owner had previously laid out property with reference to the lines of a street it was a sufficient reason for extending the lines of the lots on either side of the street parallel thereto, and most of these cases are cited by Judge Haight in his opinion. Among them are the following:

Valentine vs. Piper, 22 Pick. 88;

Piper vs. Richardson, 9 Metc. 155;

Drake vs. Curtis, 9 Cush. 446;
Commonwealth vs. City of Roxbury, 9 Grey 523;
Gerish vs. Gary, 120 Mass. 132;
Adams vs. Wharf Co., 76 Mass. 521;
Attorney-General vs. Boston Wharf Co., 78 Mass. 553.

Counsel for the plaintiff have misconceived the force and effect of the Massachusetts decisions which they cite. These cases *do not* hold that the side lines of upland lots and of streets will be extended to the extreme line of riparian ownership. On the contrary they uphold the negative of this proposition. They do hold that where co-terminus shore owners agree on the division of their subaqueous lands the courts will uphold their agreement, and further that where these lands have been built on and the artificial boundaries acquiesced in for long periods of time, an agreement of division will be implied therefrom. Beyond this they do not go.

By an ordinance passed in 1641, littoral proprietors were entitled to hold to the low water mark. The foreshore, known in Massachusetts as flats, has ever since been regarded as vested in the upland owners, although flooded by the tides. The problem of drawing the division lines between owners of these flats would have been conveniently settled by protracting the side lines of upland ownership. But the courts early refused to apply this rule of convenience, declaring it inequitable, and substituted the rule of division by right angles where the shore was straight, and proportionate division on the line of low water where the shore was curved.

Thus it was held in *Rust vs. Boston Mills Corp.,* 6 Pick. 169, that the direction of the side lines of the

upland would not govern that of the side lines of the flats, but that the *locus in quo* being situate on a cove, the division must be proportionate. This view was affirmed and followed in *Piper vs. Richardson*, 9 Met. 155, 158,—the Court declaring "the side lines of the upland have no influence in deciding the direction of the exterior side lines of the flats," in *Drake vs. Curtis*, 9 Cush. 446; *Curtis vs. Francis*, 9 Cush. 447; *Stone vs. Boston Steel & Iron Co.*, 14 Allen 130, and many others.

The intention of the ordinance was "if practicable, to give to every proprietor the flats in front of his upland of equal width with his lot at low water mark." Wilde, J., in *Gray vs. Deluce*, 5 Cush. 12. Therefore, where there was no cove or headland, a straight line is to be drawn according to the general course of the shore at high water and the side lines of the lots extended at right angles with the shore line. *Sparhawk vs. Bullard*, 1 Mete. 106; *Porter vs. Sullivan*, 7 Gray 443; *Deerfield vs. Allen*, 17 Pick. 45, 46; *Knight vs. Wilder*, 2 Cush. 210.

Around the headline, it was held, lines dividing the flats must diverge towards low water mark. *Gray vs. Deluce*, 5 Cush. 12, 13; *Porter vs. Sullivan*, *supra*.

The plaintiff has placed considerable emphasis on *Valentine vs. Piper*, 22 Pick. 85. An examination of that case shows that the dispute was not over flats but over uplands, the Court holding that proof of the ownership of the upland carried with it a presumption of ownership of the flats. Regarding the side lines of the flats, the Court held that where those lines had been established by awards or fixed by agreement of the parties, these boundaries would be recognized by the Court. In this case the northerly side line had become established by the erection of a wharf extending into the water. To this

wharf Summer Street had later been run. The wharf had finally fallen to pieces, but it location remained fixed by the line of the street. The Court held that the southerly line of the flats should conform to the established boundary on the north, referring to the street. Counsel have deduced therefrom that the Court regarded Summer Street as in itself determining the boundary. This was not the case, the line of Sumtner Street being used to fix the riparian division lines solely because it marked the line to the old wharf, which extending to low water mark had served to mark the division of ownership of the flats.

Judge Haight does not attempt to enunciate any rule for the equitable division of the accreted territory, but bases his decision upon a presumed agreement of the parties or their predecessors in the title, and makes this the decisive factor. This view Judge Haight attempts to support by the following facts:

A. New Hampshire Avenue is delineated on the "1854" map as extending in a straight line and at right angles to Pacific Avenue to the low water mark of the Atlantic Ocean, further than it extends at the present time.

B. Numerous conveyances have been made and mortgages executed upon the properties where the properties have been described by lines running at right angles to and parallel with the street system.

From A and B he finds that "It is manifest that if it should be held that the respective riparian proprietors are entitled to accretions in accordance * * * with the lines of their riparian grants * * * a very great confusion in titles would result and the

door be thrown open, in the straightening out of lines, to the making of exorbitant demands, etc."

Before considering the reasoning of Judge Haight particular attention should be called to the following facts: That as to all lands lying eastward of New Hampshire Avenue and owned by the plaintiff's predecessor in the title, except for a strip of 90 feet east of and parallel with New Hampshire Avenue, riparian grants along radial lines were made by the State of New Jersey, the first of which was dated December 29, 1900, and made to John McPherson, and two of which were made on October 21, 1901, to Charles G. Henderson, et als. (See Map Exhibit D8.)

It will be recalled that the title of the plaintiff as to a strip 100 feet in width and beginning 90 feet east of New Hampshire Avenue came from the Atlantic Beach Front Improvement Company, who conveyed to Henderson, Moss and Hancock by deed dated November 1, 1899. (Appeal Record, p. 75.) Henderson, et als., conveyed to Conrow by deed dated April 14, 1903. (Appeal Record, p. 76.) Conrow conveyed to the States Avenue Land Company by deed dated April 14, 1903. (Appeal Record, p. 76.) States Avenue Land Company conveyed to Dewey Land Co. by deed dated December 9, 1904. (Appeal Record, p. 77.) It will, therefore, be seen that the plaintiff's predecessors in the title, to wit, Henderson and others, not only acquiesced in the method of radial lines of the riparian grants, but actually received conveyances thereof from the State of New Jersey prior to conveying their title to the plaintiff.

Not only did the plaintiff's predecessors in the title recognize and accept radial boundary lines for the riparian grants, but the plaintiff himself spe-

cifically recognized the principle of radial lines as applied to accretions by the following formal deeds:

Deed, Dewey Land Company to Louis E. Stern, dated Juy 17, 1912, the description of which reads as follows:

> "Beginning at the intersection of the south line of Dewey Place with the east line of New Hampshire Avenue, and extending thence east along the south line of Dewey Place 190 feet; thence southward parallel with New Hampshire Avenue 350 feet, more or less, to high water line of Atlantic Ocean as it existed on April 14, 1903; *thence east at right angles to high water line of the Atlantic Ocean as it existed in* 1856, 770 *feet, more or less, to said high water line as it then existed;* thence southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where the same would be intersected by the east line of New Hampshire Avenue extended; thence north in the east line of New Hampshire Avenue, extended, 1120 feet, more or less, to beginning." (Appeal Record, p. 67.)

Louis E. Stern conveyed to Samuel F. Nirdlinger, dated July 17, 1912, the property last above referred to by a description identical with that contained in the deed from the Dewey Land Company to himself.

It is at once apparent that the deed from Stern to Nirdlinger, last above referred to, included lands formed by accretion between 1903 and the date of the deed (see Exhibit D8), and that thereby there was a clear recognition by Nirdlinger of the principle of dividing the accreted territory by lines formed at right angles to the shore line. It is true

that he adopted the shore line of 1856 as the base of his right angle. While this line cannot be accurately defined at the present time, every known high water line, as well as the low water line of 1852, was convex in contour.

We then have the plaintiff himself by a formal deed made directly to himself recognizing the principle of radial lines of division as to a part of the *locus in quo*. We also have his predecessors in the title, namely, Henderson, Moss and Hancock, accepting riparian grants with radial lines of division, from the State of New Jersey affecting another part of the *locus in quo*.

THE PRESUMED AGREEMENT OF THE PARTIES THAT NEW HAMPSHIRE AVENUE SHOULD CONSTITUTE A BOUNDARY LINE OF ACCRETIONS WHEN THEY SHOULD FORM.

With whom was such an agreement made? Down to 1899 the lands on both sides of New Hampshire Avenue were in common ownership so far as the beach front was concerned. There was no one with whom any agreement could have been made. It was impossible for the holder of the common title to "agree" with himself. Cases cited both in the opinion of Judge Haight and in the brief of counsel refer to agreements between co-terminus owners, and relate to lands below the high water mark. Clearly the adoption of the boundary line above the high water mark would be no evidence of an agreement as to the division of lands below the high water mark, or of accretions should they occur. There was clearly, therefore, no agreement prior to 1899 as to the division of accretions, because there was no one with whom such an agreement could be made.

The record in this case discloses every conveyance made to the high water mark and covering all of the lands acquired by John McClees. As none of the several hundred grantees who accepted deeds running at right angles to or parallel with the street system were riparian owners it makes no difference whatever to their titles how the shore line originally ran, or how the division lines of accretions formed subsequently to their acquisition of title shall go. McClees could convey lands which he owned inside of the high water mark by any angles that he saw fit. It was his land until 1899 and extended to the high water line wherever it might be. The only conveyances made subsequent to that time are accounted for in this proceeding. How it is "manifest * * * that a very great confusion in titles would result" to several hundred other grantees is not apparent. Their title papers were not before the Court; no one of these parties was before the Court, and it does not appear by any proof that their titles would be in any way adversely affected. As the land was in a common grantor until 1899, and their conveyances must have been made prior to that time, they received their titles from the only man who had any claim thereto, viz., John McClees, regardless of how future accretions should be divided. Accretions had formed when they took their deeds, and there could be no adverse claimant because of the fact that McClees owned all of the land to the high water mark.

By way of illustration let us assume that McClees continued to own all of the lands appearing upon Exhibit D8 up to the high water mark of 1907, and that he conveyed them to sundry grantees, reserving to himself a belt of 15 feet of ocean front. There would be nothing whatever to prevent his making conveyances within the lands thus indicated at right

angles to or parallel with the street system, nor would the rights of such grantees be in any way affected if subsequently to 1907 accretions formed out to and corresponding with the riparian commissioners' exterior line as shown upon Exhibit D8. Obviously all of such newly accreted lands would belong to McClees, and obviously all of the lands theretofore granted by him parallel with or at right angles to the street system would be the property of his grantees, and no confusion to the title of his grantees would result from the last formed accretions.

It seems passing strange that if the confusion in their titles (not before the Court) was so "manifest" that it would not have been apparent to Judge White who, as is well known, lives at Atlantic City, and who endorsed the plotting of the vicinity for riparian grants as a practical and legal ascertainment of the boundary lines of subsequent accretion gains to the adjacent high lands, should such gains occur. It is scarcely conceivable that Judge White, a resident of Atlantic City, and the owner of valuable property interests along the beach front, should have been so insensible to the danger as to promulgate a rule, the effect of which would be to throw into confusion hundreds of titles almost at his very door.

ON THE RIGHT TO CROSS THE LINE OF NEW HAMPSHIRE AVENUE:

It must be remembered that in New Jersey abutting property owners own the fee to the center of the street. *Ocean City vs. Shriver*, 64 N. J. L. 554; *Salter vs. Jonas*, 39 N. J. L. 469. This fee is sub-

ject to the easement of the public, but the fee is in the abutting owners.

It was absolutely essential that the line of accretions for lands formerly owned by McClees should cross the streets as laid out in the Atlantic City street system. At one time the high water mark was practically at the corner of Vermont and Pacific Avenues. (See Judge Haight's opinion, p. 331, lines 30-34.) Since that time lands have formed at least 1000 feet south of Pacific Avenue, at least 800 feet east of Vermont, which made necessary the crossing of the following avenues: Pacific, Vermont, New Hampshire, and Maine Avenues.

Upon what principle of either law or logic can it be said that the owner of the lands at the high water mark at the time when it intersected Vermont and Pacific Avenues would be barred from accretions crossing the street system? To whom would such accretions belong? If to the owner of the shore line then it would be absolutely necessary that his rights should extend across the street system. How would the public be injured? The public easement in the street would continue regardless of the abutting property owner's ownership of the fee. Since the public would not be injured, and since there could be no rival claimants where the shore line was in common ownership, to deny the riparian owner the right of crossing the street system would be a palpable absurdity. If the streets were originally dedicated to the high water mark the dedication would continue, and would carry the dedicated street to the new high water mark formed by accretions.

Judge Haight relied upon the case of *Stockton vs. Browning*, 18 N. J. Eq. 309, which he considered so nearly analogous as to make the case an important authority. *Stockton vs. Browning* was a case where

an old division line between lands lying on tidewater had for more than forty years been treated by the owners as extending over the shore or the lands between high and low water, and regarded the same as the division line of their right upon the shore. In that case it was held that the recognition of this line *below* the high water line fixed the rights of the parties. It is not authority, however, for the proposition that the recognition of the line above the high water mark, to wit, New Hampshire Avenue (in this case) fixes the line for the division of accretions.

In the *Browning* case the division line was created by deed of 1695. By conveyance made in 1769 the division line was fixed and was recited to extend to *low water mark*. A similar deed in 1843 conveyed the lands to *low water mark*. It was originally supposed in New Jersey that the title of the riparian owner extended to low water mark. As there had been this recognition of a line of division for a long period the Court held that the parties were bound by the recognized line when accretions occurred.

In the Browning case, however, there were two elements not present in the case *sub judice*: (1) That the agreement as to the division line related to lands below the high water mark. (2) There were adjoining owners (so that an agreement could be made). In the case *sub judice* New Hampshire Avenue is above the high water line and the easement of New Hampshire Avenue was not intended as a line of division between separate owners but the lands on both sides of the street were in common ownership. Will the Court upon such a slender foundation assume and create an agreement that the mere laying out of this public street through lands in common ownership at the time was acquiesced in

by the common owner as the means of unnecessarily depriving him of his right of accretions when they should occur? Can it go further than to say that the laying out of the public streets was an acquiescence by the owner of the common title in the public easement or use of such street? Certainly the public rights demanded nothing more than this, and to exact more of the owner would be to deprive him of his natural rights without benefit to any one else in such a situation. *If such owner was not entitled to the accretions there appears to be no one else in being who could lawfully claim the same.*

A number of cases have been cited by the plaintiff in support of the proposition that the defendant has no right to cross the line of New Hampshire Avenue. Among them is the case of *Banks vs. Ogden*, 2 Wall. 57. An examination of these cases discloses the fact that the streets referred to were streets intervening and bordering the high water mark, and not streets running at right angles thereto, as does New Hampshire Avenue. When properly considered they simply hold the well-known doctrine that if there be any intervening lands between that of the claimant and the high water mark, the claimant can take nothing because he is not a riparian owner. Extended comment or discussion is unnecessary.

Appellant's reasons for the reversal of the decree of the District Court may be summarized as follows:

(a) Because this matter is *res judicata* by the New Jersey suit. The reasons in support of the above are summarized at pages 19 and 20 of this brief under the title of "*Res Judicata*."

(b) The appellant's riparian grant conveys an absolute title. In support thereof, See *Dewey Land Co. vs. Stevens*, 83 N. J. Eq. 314 and 656; *Stevens vs. The Paterson Railroad*, 34 N. J. L. 532, and other cases cited under the caption of "On the Effect of the Riparian Grant." (Pages 21 and 22.)

(c) The appellant is entitled to the *locus in quo* by reason of accretions. In support thereof the following propositions are advanced:

1. The basis of division is the respective rights of Burkhard (appellant's predecessor in title) as of November, 1899, and the Atlantic Beach Front Improvement Company.

2. The method of division should be such that the contiguous riparian proprietors, viz., Burkhard and the Atlantic Beach Front Improvement Company, shall have such a proportion of the alluvial soil as the total extent of their respective front lines bear to the total quantity of the alluvial soil to be divided, and such line of division is referable not to the side lines of the original conveyance but to the front line alone.

3. Because the mere protraction of the side lines would result in an inequitable apportionment, in that all of the gain in the shore line would go to the most easterly proprietor instead of being equitably divided.

4. Because the assumed agreement that New Hampshire Avenue should constitute a boundary line between co-terminus owners has no basis in fact, the lands on both sides of the street being in com-

mon ownership up to the time of the conveyance to Burkhard, and there being no co-terminus owners between whom an agreement could be made.

5. Because all of the lands east of *Vermont* Avenue south of Pacific Avenue have been formed by accretions and have crossed several streets, and an attempt to limit the riparian owner so that he could not cross the line of any public street would be to exclude from ownership by accretion all lands lying south of Pacific Avenue and east of Vermont Avenue, and such a ruling would unquestionably unsettle hundreds of titles.

6. Because plaintiff and plaintiff's predecessors in the title acquiesced in the division of a part of the *locus in quo* along radial lines, both as to riparian grants and accretions. See riparian grant, State of New Jersey to John McPherson, and State of New Jersey to Charles G. Henderson (Map, Exhibit D8; Brief, p. 34) and deed, Dewey Land Co. to Stern (Exhibit P24; Appeal Rec. p. 67) and Stern to Nirdlinger (Exhibit P26; Appeal Rec. p. 68).

In conclusion, it is respectfully submitted that the decree should be reversed for the reasons stated in this brief.

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